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8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**
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11 DANY ROJAS-VEGA,

12 Plaintiff,

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14 vs.
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17 UNITED STATES CITIZENSHIP
18 IMMIGRATION SERVICE,
19 DEPARTMENT OF HOMELAND
SECURITY, AND IMMIGRATION AND
CUSTOMS ENFORCEMENT,

20 Defendants.
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CASE NO. 13-CV-172-LAB

**ORDER GRANTING MOTION TO
PROCEED *IN FORMA*
PAUPERIS;**

**ORDER DENYING MOTION FOR
LEAVE TO FILE DOCUMENTS
ELECTRONICALLY;**

**ORDER DISMISSING
PLAINTIFF'S COMPLAINT
WITHOUT PREJUDICE; AND**

**ORDER TO SHOW CAUSE WHY
CASE SHOULD NOT BE
DISMISSED FOR IMPROPER
VENUE**

22 On January 22, 2013, Plaintiff Dany Rojas-Vega, proceeding *pro se*, filed this action seeking
23 relief under the Freedom of Information Act (FOIA) and the Privacy Act against the United States
24 Citizenship and Immigration Service (USCIS), the Immigration and Customs Enforcement (ICE), and
25 ICE's Director, John Morton. Pending before the court is his petition to proceed *in forma pauperis*
26 (IFP).

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1 **I. Background**

2 This action results from Rojas-Vega's third FOIA request for a 1995 state court transcript,
3 notes and memos related to that case, and the names and titles of the INS official involved. (Compl.
4 at 6). Rojas-Vega first requested these items from the Immigration and Naturalization Service in
5 June 2003, but never appealed to the district court. *Id.* He made a second request to the agency
6 on September 12, 2008. He received a number of documents, though some were withheld. Rojas-
7 Vega appealed these withholdings to the agency in August 2009, and then to this court in September
8 2009. *Rojas-Vega v. Cejka*, 2010 WL 1541369 (S.D. Cal. 2011). This court dismissed that case *sua*
9 *sponte* for failure to state a claim for which relief can be granted. *Id.* at *4–5. After four amended
10 complaints, Rojas-Vega failed to correct this defect, and the complaint was dismissed without leave
11 to amend. *Rojas-Vega v. Cejka*, 2011 WL 2417130, *2–3 (S.D. Cal. 2011).

12 Rojas-Vega's third request, the subject of this action, was submitted to USCIS on May 21,
13 2012, for the same documents previously requested. (Compl. at 6). He alleges the agency released
14 2,054 documents, but withheld 21 pages on September 19, 2012, and that he appealed the
15 withholding of those documents to the agency on September 20, 2012, on the basis that the
16 documents he received are not what he requested. (Compl. at 9). Though unclear as to the exact
17 date, it appears he received a response from the agency in October or November 2012 releasing an
18 additional 26 documents, but affirming the withholding 79 documents in part, and 21 in full. (Compl.
19 at 10).

20 **II. Motion to Proceed IFP**

21 Rojas Vega's affidavit states he has been unemployed for over a year, he has no source of
22 income, and he has few assets, consisting of two laptops and a printer. His monthly obligations
23 include maintaining these resources and paying for health insurance and internet. He relies on his
24 parents to maintain his obligations and livelihood. The court finds Rojas-Vega is unable to pay the
25 filing fee; therefore, his motion to proceed IFP is **GRANTED**.

26 When a plaintiff is permitted to proceed IFP, the Court is required to screen the complaint,
27 and to dismiss it to the extent it is frivolous or malicious, fails to state a claim, or seeks monetary
28 relief from an immune defendant. See 28 U.S.C. § 1915(e)(2)(B); *Lopez v. Smith*, 203 F.3d 1122,

1 1127 (9th Cir. 2000) (en banc). The standard for whether the plaintiff failed to state a claim upon
 2 which relief may be granted under section 1915(e)(2)(B) is the same standard applied for failure to
 3 state a claim under Federal Rule of Civil Procedure 12(b)(6). *Watison v. Carter*, 668 F.3d 1108, 1112
 4 (9th Cir. 2012). Under that standard, the complaint must allege enough facts that, if true, state a
 5 plausible claim for relief. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v.*
 6 *Twombly*, 550 U.S. 544, 570 (2007)). In reviewing the complaint, the court will assume the facts, but
 7 not the legal conclusions, to be true. *Id.* at 679. The Court will construe a *pro se* plaintiff's pleadings
 8 liberally, but will not supply elements of the claim that were not pleaded. See *Byrd v. Maricopa*
 9 *County Sherriff's Dept.*, 629 F.3d 1135, 1140 (9th Cir. 2011).

10 **A. FOIA Claim**

11 Rojas-Vega's FOIA claim suffers from several defects. To make out a claim under FOIA, the
 12 plaintiff must allege that the defendant improperly withheld agency records. *Yonemoto v. Dep't of*
 13 *Veterans Affairs*, 686 F.3d 681, 689 (9th Cir. 2012). First, Rojas-Vega fails allege facts supporting
 14 that the state court transcripts he requested are "agency records." Documents are "agency records"
 15 if they are (1) generated or obtained by the agency, and (2) within the agency's possession through
 16 the legitimate function of official duties. See *U.S. Dept. of Justice v. Tax Analysts*, 492 U.S. 136,
 17 144–7 (1989). But Rojas –Vega alleges no facts giving rise to a plausible claim that USCIS obtained
 18 the state court transcripts, or maintained them in the legitimate conduct of official business. He
 19 seems to suggest that USCIS obtained the state court transcript through its involvement in his
 20 previous criminal proceeding. However, this is more a conclusion that the agency has the record,
 21 without any supporting facts to suggest it is plausible.

22 Second, Rojas-Vega seeks "names and titles" of individuals involved in the previous state court
 23 proceeding. But FOIA does not allow for requests for "information in the abstract." *Forsham v.*
 24 *Harris*, 445 U.S. 169, 185 (1980). Further, he cannot maintain a FOIA claim against the Director of
 25 ICE, John Morton, in his individual capacity because FOIA does not apply to individuals.¹ See *Drake*
 26 *v. Obama*, 664 F.3d 774, 785 (9th Cir. 2011).

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28 ¹ Because none of Rojas-Vega's individual claims include USCIS Director John Morton, the court addresses this issue under the possibility that Rojas-Vega is making a FOIA claim against Mr. Morton.

1 **B. Privacy Act Claim**

2 Rojas-Vega's Privacy Act claim also fails to state a claim. Under the Privacy act, an individual
3 may bring against a federal agency to gain access to records pertaining to the individual that the
4 agency wrongfully withheld. 5 U.S.C. § 552a(g)(1)(B). However, the Privacy Act only affords this
5 right to citizens and non-citizens lawfully admitted for residence. See *St. Michael's Convalescent*
6 *Hosp. v. California*, 643 F.2d 1369, 1373 (9th Cir. 1981). Because Rojas-Vega does not fit into either
7 of these categories, he cannot seek relief under the Privacy Act.

8 **III. Venue**

9 The Court may raise the issue of defective venue *sua sponte*. See *Costlow v. Weeks*, 790
10 F.2d 1486, 1488 (9th Cir.1986). There are no facts in the complaint that suggest venue is proper
11 here. Under FOIA, venue is proper in the district in which the plaintiff resides, the district where the
12 records are maintained, or the District of Columbia. See *Arevalo-Franco v. U.S. I.N.S.*, 889 F.2d
13 589, 591 (5th Cir. 1989); 5 U.S.C. 552(a)(4)(B). As Rojas-Vega no longer resides in San Diego,
14 venue is not proper here unless he alleges the records are kept within this district. Therefore, it
15 appears venue may be improper in this District.

16 This is a particular concern because, as a plaintiff proceeding IFP, Rojas-Vega is
17 entitled to have the U.S. Marshals serve Defendants with process. Serving Defendants in distant
18 locations involves needless difficulty and strains public resources, assuming it is even possible.

19 **IV. Motion for Leave to File Papers Electronically**

20 Rojas-Vega has filed a motion for leave to file documents electronically in this District's
21 CM/ECF system. In this District, attorneys must ordinarily file electronically, but *pro se* litigants, such
22 as Rojas-Vega, must ordinarily file pleadings in paper form. If they wish to file electronically, they
23 must seek leave to do so. See Electronic Case Filing Administrative Policies and Procedures Manual,
24 § 2(b). Because CM/ECF filing entails entering documents directly into the docket, the Court will not
25 approve electronic filing unless a *pro se* litigant shows he is able to meet the system's technical
26 requirements, which are posted on the Court's website. See *id.* at §§ 1(l) and 2(b). This requires,
27 among other things, a showing that the litigant has adequate electronic equipment and software.

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1 Rojas-Vega's motion refers the Court to the complaint, which includes a request for leave to
 2 file electronically. The motion itself trails off in the middle of a paragraph. The complaint (¶¶ 56–63)
 3 mentions the general type of equipment he has, and says he is attaching specifications, owner's
 4 manuals, and a statement from his internet service provider. In fact, they are not attached. The only
 5 exhibits that shows anything about the type of equipment or service he has are two receipts attached
 6 to his IFP motion, and an undated letter. The first receipt is an Office Depot receipt showing that he
 7 purchased an Acer computer May 29, 2008, and the second is a Wal-Mart receipt showing the
 8 purchase of a "laptop PC" for \$378.00 in February, 2012. His hand-annotation identifies it as an "Acer
 9 Aspire." He doesn't explain any more than that, however. The letter is undated but notes a request
 10 for internet service during the month of November, 2012.

11 The Court cannot tell which computer Rojas-Vega currently owns or plans to use for
 12 electronic filing, whether either can run the required software, whether his internet service is
 13 adequate to handle filing requirements, or whether his scanner meets the system's technical
 14 specifications. Even if his equipment was adequate when he bought it, there is no assurance they
 15 are still adequate. For example, it may not now have adequate memory to run the updated software
 16 required for electronic filing. It is incumbent on Rojas-Vega to show he is able to file documents
 17 electronically, and reliably receive electronic notices, and his motion fails to do that.

18 **IV. Conclusion and Order**

19 For reasons set forth above, Rojas-Vega's motion to proceed IFP is **GRANTED**. The
 20 complaint is **DISMISSED WITHOUT PREJUDICE**. The motion for leave to file papers electronically
 21 is **DENIED**.

22 Rojas-Vega is also **ORDERED TO SHOW CAUSE** why the complaint should not be
 23 dismissed for improper venue. He may do so by filing a memorandum of points and authorities, not
 24 longer than five pages, not later than **July 15, 2013**.² If Rojas-Vega agrees venue is improper, he
 25 need not do anything, and this action will be dismissed without prejudice to his filing it in the proper
 26 venue.

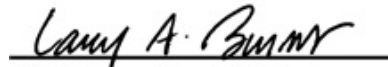
27 ² The complaint says mail can take up to two weeks to reach Rojas-Vega in Costa
 28 Rica. The Court therefore has set this deadline so as to give him ample time to receive this
 order, consider and prepare his response, and mail it back in plenty of time to meet the filing
 deadline. The response only needs to address the venue issue.

1 If Rojas-Vega responds by attempting to show that venue is proper in this District, he must
2 then file an amended complaint no later than **July 30, 2013**. If he does not do so, the entire action
3 will be dismissed with prejudice for failure to state a claim.

4 Finally, Rojas-Vega is reminded that the filing deadline is the date by which documents must
5 be filed in the docket, not the deadline for mailing them. The Court has set deadlines with this in
6 mind.

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8 **IT IS SO ORDERED.**

9 DATED: May 30, 2013

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11 **HONORABLE LARRY ALAN BURNS**
12 United States District Judge
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